



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 22, 1996

Mr. Jay Granberry
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR96-1213

Dear Mr. Granberry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40717.

The Bryan Police Department (the "department") received a request for information seeking the employment, payroll and training records of a department police officer, Ricky Moore. You claim that the requested information is excepted from required public disclosure by section 552.103(a) of the Government Code. You have submitted for our review a representative sample of the documents you seek to withhold.

Our review of the submitted material at issue indicates that section 143.089 of the Local Government Code is applicable to the much of the requested documents. Section 143.089 of the Local Government Code works in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(a)(2) mandates that documents relating to "any misconduct by the fire fighter or police officer" must be placed in a police officer's civil service file "if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter." Since some of the documents submitted to this office are related to alleged misconduct which resulted in disciplinary action, we assume that the documents are part of the officer's civil service file.

However, some of the documents may not be a part of the police officer's civil service file. Section 143.089(g) of the Local Government Code allows for the maintenance of a separate departmental file in addition to the civil service file provided for in section 143.089(a)(2). This separate file is for the department's own internal use:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

A request for information contained within the internal file must be referred to the civil service director or his designee. Local Gov't Code § 143.089(g); *see City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied). Thus, if any of the requested documents are properly held only within the department's internal file, the request for this information must be referred to the civil service director or his designee.

You assert that all of the requested documents may be withheld under section 552.103(a). Thus, we will address whether the department may withhold information that is not contained within the separate departmental personnel file provided for in section 143.089(a)(2).

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Open Records Decision No. 551* (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you state that the department is currently involved in criminal litigation where Officer Moore was the arresting officer. You have provide the State's charging instrument in that cause, *State v. Stinson*, No. 3097-94 (County Court at Law, Brazos County, Tex., Sept. 26, 1994). After reviewing the submitted materials, we conclude that litigation is pending and that the requested documents relate to the litigation. You may, therefore, withhold the requested information that is not contained within the separate departmental personnel file provided for in section 143.089(a)(2).¹

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). *But see* Gov't Code § 552.352 (the distribution of confidential information is a criminal offense).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 40717

Enclosures: Submitted documents

¹ In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

cc: Mr. Sam Rowland
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(w/o enclosures)